IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

W.P. No. 385 of 2001 (S/B)
Old No. 24134 of 1988

U.P. State Textile Corporation Ltd. & others …….. Petitioners

Versus

U.P. Public Service Tribunal (II) & another …….. Respondents

Mr. U.K. Uniyal, learned counsel for the petitioners.
Mr. Sharad Sharma, learned counsel for the respondent No. 2.

Hon. P.C. Verma, A.C.J.
Hon. Rajesh Tandon, J.

By the present writ petition, the petitioners have prayed for the issue of a writ, order or direction in the nature of certiorari quashing the order dated 16th September, 1988 passed by the respondent No. 1.

Brief facts giving rise to the present writ petition are that the respondent No. 2 was appointed by the petitioners by means of appointment letter dated 16.3.1982. The appointment letter contained in Annexure I to the writ petition shows that the respondent No. 2 was appointed as a Labour Officer, Kashipur on a consolidated salary of Rs. 1500/- per month plus free furnished accommodation or house rent allowance w.e.f. 14th December, 1981. The appointment letter further shows that the services are purely temporary and liable to termination without reasons by one months notice from either side as per service by-laws of the Corporation.

On 3rd May, 1983 the services of the respondent No. 2 were terminated simpliciter. The order dated 3rd May, 1983 reads as under:

> ”The service of Shri R.S. Sharma, Labour Officer, U.P.S.T.C. Spg, Mill, Kashipur (Nainital) are no longer required and are hereby terminated in terms of his appointment.
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> Shri Sharma shall be paid one month’s pay in lieu of notice.”

Respondent No. 2 preferred an appeal on 30th May, 1983 before the Chairman-cum-Managing Director, U.P. State Textile Corporation Ltd., which was dismissed by order dated 18th April, 1984.

As a result, respondent No. 2 preferred a claim petition on 5th June, 1984 in U.P. Public Service Tribunal. Respondent No. 2 has prayed that the order dated 3rd May, 1983 passed by the joint Managing Director, U.P. State Textile Corporation Ltd. be quashed and it may be declared that the respondent No. 2 even now is holding the post of Labour Officer in the Corporation. Respondent No. 2 has also sought the quashing of the order dated 18th April, 1984, whereby the Chairman-cum-Managing Director of the Corporation has dismissed the appeal of the respondent No. 2 filed against the termination order.

Both the parties have exchanged their pleadings before the Public Service Tribunal. Respondent No. 2 has filed a rejoinder affidavit and has stated that the appointment letter dated 5th December,1981sent to him about was not the appointment letter, but it was the letter informing him about his selection and joining of duty and the real appointment letter was dated 16th March, 1982. The Public Service Tribunal has held that the appointment of the respondent No. 2 was not on the permanent basis. The Tribunal in his order has mentioned as under:

> "It was, therefore, not possible to agree with the contention of the petitioner that he held the post permanently."

The Tribunal thereafter has considered the plea of the respondent No. 2 with regard to the arbitrariness and discrimination and has allowed the claim petition on that ground alone. The reference was allowed and the orders dated 3rd May, 1983 and 5/18 April, 1984 were quashed.

Against the order dated 16th September, 1988 passed by the Judicial Member of the U.P. Public Service Tribunal in the High Court of Allahabad, the learned Single Judge of the Allahabad High Court has passed the interim order. As a result of that interim order, the respondent No. 2 was reinstated.

Both the parties have agreed that the respondent No. 2 has now retired and is no more in the job. Learned counsel for the petitioner Shri. U.K. Uniyal has submitted that in view of the observations of the

Public Service Tribunal that the appointment of the respondent No. 2 was purely temporary and was liable to be terminated at any point of time, the entire order of the Tribunal is liable to vitiated as the claim petition, itself, was not maintainable.

Respondent No. 2 in personals appeared, however, Shri Sharad Sharma, Advocate also appeared as a counsel appointed by the Court. Both of them have referred paragraph 10 of the writ petition with regard to the granting of the increments from time to time. Paragraph 10 of the writ petition is quoted below:

> "That during the tenure of his temporary appointment, the respondent No. 2 was granted increments also like all other employees which became due within the period of temporary employment. By mere granting him the regular periodical increments in accordance with his grade, cannot and would not amount to change of the temporary tenure of the service of the respondent No. 2."

Learned counsel for the petitioners has stated that the respondent No. 2 cannot get any benefit of the same as the initial appointment was temporary. Counsel foe the petitioners has also invited the attention of this Court regarding the counter affidavit filed before the U.P. Public Service Tribunal in claim petition. it was clearly stated in the counter affidavit that the appointment of the respondent No. 2 was temporary one and not the permanent one and the annual increment is given to every officer whether temporary or permanent mostly in the month of October every year without affecting the nature of employment and as such, the respondent No. 2 was also granted an increment of Rs. 120/- as the usual practice without affecting the temporary nature of his services. It was denied that such annual increments are given only to permanent employees, but it is being given to permanent and temporary employees both. Relevant paragraph 4 & 5 of the counter affidavit are quoted below:

> "4. That so far as the contents of para 4 of the petition are concerned it is clearly made out by the letter dated 5.12.81 that the appointment was temporary one and not the permanent one.

However, the deponent is advised to state that the annual increment is given to every officer whether temporary or permanent mostly in the month of October every year without affecting the nature of employment, as such the petitioner was also granted an increment of Rs. 120/- as the usual practice without affecting the temporary nature of his services. It is wrong to state that such annual increments are given only to permanent employees as stated by the petitioner.

5. That the contents of para 5 of the petition are emphatically denied. There is no such Bye-law in the Respondents concern where the increment is given only to permanent employees. The annual increment is given to permanent and temporary employees as well."

In the counter affidavit filed in reply to the writ petition, the respondent No. 2 has filed another order dated 16th March, 1982. Respondent No. 2 wanted to emphasize that the appointment letter does not indicate that it was a temporary one.

A bare reading of the appointment letter filed by the petitioner and filed by the respondent No. 2, both, indicates that the appointment of the respondent No. 2 was on a consolidated salary of Rs. 1500/- per month and there is no indication that the appointment was made on permanent basis on any pay-scale. But it was made purely on temporary basis on a consolidated salary.

A perusal of the report of the Selection Committee in respect of its meeting held on 5th December, 1981 shows that the respondent No. 2 was appointed on a consolidated salary and the appointment was not against any particular pay-scale. Chapter III of the Manual of Service By-laws of U.P. State Textile Corporation Ltd. and U.P. State Spinning Mills Company provides the appointment on temporary posts. Rule 7 clearly provides that appointment on a post not created as a permanent post shall be made on temporary basis. Rule 8 provides the termination by notice on either side. Rules 7 & 8, both are quoted below:

"**7. Appointment on temporary posts** – Appointment on a post not created as a permanent post shall be made on temporary basis.

8. Termination by notice on either side – (1) The appointing authority may, at any time during the currency of the temporary tenure, terminate the service of a temporary employee by giving him one month's notice or emoluments for such lesser period by which the notice falls short of one month.

(2) On his part a temporary employee shall have the option of quitting service by giving on month's notice to the appointing authority or paying to the Corporation an amount equal to his one month's pay:

Provided that the appointing authority may, in any special case, waive the recovery of such payment in whole or in part."

U.P. State Textile Corporation (Recruitment & Promotion By-laws), 1978, which is also applicable to U.P. State Spinning Mills Company provides the appointment on probation for a period of 2 years. Rule 17 in this regard is quoted below:

"17. Probation – (1) Every person on appointment, whether by direct recruitment or by promotion, shall be placed on probation for a period of two years commencing from the date on which he assumes charge of the post:

Provided that the appointing authority may, without assigning any reason, extend the period of probation by a spell not exceeding one year.

(2) The performance of the probationer will be watched during the period of probation by the supervising officer who, if he himself is not the appointing authority, will, at the end of the period of probation or the extended period of probation, as the case may be, issue a certificate embodying his assessment of the probationer's work and conduct and certify or not certify whether he is fit for confirmation."

Rule 18 of the U.P. State Textile Corporation (Recruitment & Promotion By-laws), 1978 contains the provision for discharge during probation. It reads as under:

> **"18. Discharge during probation** – (1) A directly recruited probationer may be discharged by the appointing authority during or at end of the original or the extended period of probation, as the case may be, without assigning any reason. Such discharge shall be without notice and shall not entitle the discharge to any compensation.
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> (2) A directly recruited probationer shall have the option of quitting service at any time during the original or the extended period of probation, by giving a notice of not less than one month to the appointing authority or depositing, in lieu of such notice, an amount equal to his emoluments (including dearness and other allowances) earnable for a service of one month:
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> Provided that the Managing Director may, in any special case, waive the requirement of such deposit.
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> (3) A promoted probationer may be reverted to his original post during the original or the extended period of probation by the appointing authority without reason assigned. Here too no compensation will be claimable by the employee."

As will appear from Rule 18 that a directly recruited probationer may be discharged by the appointing authority during or at the end of the original or the extended period of probation without assigning any reasons.

Rule 19 of U.P. State Textile Corporation (Recruitment & Promotion By-laws), 1978 provides for confirmation. It reads as under:

> "**19. Confirmation** – A probationer shall be confirmed on his post at the end of the original or the extended period of probation if the appointing authority is, upon the report of the supervising officer and/or otherwise, satisfied that the probationer has made due use of his opportunities of service,

has completed successfully such training as may have been prescribed and is otherwise fit for confirmation."

There is noting on the record that the respondent No. 2 was ever confirmed and as such, the appointment of the respondent No. 2 being purely temporary in nature is liable to be terminated by giving one months notice from either side. The same having been done, we find no fault in the order of termination.

We have also gone through the written arguments submitted on behalf of respondent No. 2. In the written arguments, the respondent No. 2 has referred the sub-rule ix of Rule 3 of the Fundamental By-Laws of 1978 of the Corporation, where the temporary post is defined as well as Rule 21, both are quoted below:

> **"3(ix) "Temporary Post**" means a post carrying definite rate of pay created as temporary post by the competent authority.
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> **Rule 21 "Pay on recruitment or promotion** – (1) the initial pay of a direct recruit shall be fixed at the minimum of the scale of pay of the post to which he has been appointed."
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> The appointment letter, itself, indicates that the appointment was on consolidated pay and every appointments will be on probation for a period of two years. the appointing authority has been given a liberty to discharge a directly recruited probationer during or at the end of the original or the extended period of probation without assigning any reason. In State of U.P. & others Vs Kaushal Kishore Shukla reported in 1991(1) SCC 691, the similar controversy came up before the Apex Court. The Apex Court has held that a temporary Government servant has no right to hold the post and his services are liable to be terminated by giving him one month's notice without assigning any reason either under the terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of temporary

Government servant. The observations of the Apex Court are quoted below:

> "7. A temporary government servant has no right to hold the post, his services are liable to be terminated by giving him one month's notice without assigning any reason either under the terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of temporary government servants. A temporary government servant can, however, be dismissed from service by way of punishment. Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service or the relevant rules or it may decide to take punitive action against the temporary government servant. If it decides to take punitive action it may hold a formal inquiry by framing charges and giving opportunity to the government servant in accordance with the provisions of Article 311 of the Constitution. Since, a temporary government servant is also entitled to the protection of Article 311(2) in the same manner as a permanent government servant, very often, the question arises whether an order of termination is in accordance with the contract of service and relevant rules regulating the temporary employment or it is by way of punishment. It is no well settled that the form of the order is not conclusive and it is open to the court to determine the true nature of the order. In Parshotam Lal Dhingra Vs Union of India reported in AIR 1958 SC 36, a Constitution Bench of this Court held that the mere use of

expression like ‘terminate’ or discharge’ is not conclusive and in spite of the use of such expressions, the court may determine the true nature of the order to ascertain whether the action taken against the government servant is punitive in nature. The court further held that in determining the true nature of the order the court should apply two tests namely: (1) whether the temporary government servant had a right to the post or the rank or (2) whether he has been visited with evil consequences; and if either of the tests is satisfied, it must be held that the order of termination of a temporary government servant is by way of punishment. It must be borne in mind that a temporary government servant has no right to hold the post and termination of such a government servant does not visit him with any evil consequences. The evil consequences as held in Parshotam Lal Dhingra case do not include the termination of services of a temporary government servant in accordance with the terms and conditions of service.”

Counsel for the respondent No. 2 has raised a plea that the actual appointment letter was not placed on record, suffice it to state that the statutory rules regulating the terms and conditions contain a provision of probation of two years, a right has been conferred upon the authority to terminate the services either during or at the end of the period of probation without assigning any reason and as such, the respondent No. 2 has no right to continue and challenge the termination order dated 16th September, 1988.

We, therefore, are of the opinion that the respondent No. 2 has no right to hold the post and the services were liable to be terminated under the terms of the contract as well as under the statutory rules regulating the terms and conditions.

By virtue of the order dated 3rd September, 1996, the respondent No.2 was reinstated on the post of Labour Officer on the emoluments which he was getting at time when his services were terminated. Admittedly, respondent No. 2 has worked up till his date of superannuation on the basis of interim order in his favour and therefore, the emoluments earned by the respondent No. 2 can in no way on recoverable by the petitioners on the principle contained in the maxim *actus curiae neminem gravabit* as held in JT 2000 (4) SC 56 in the following words:

> *' In the facts and circumstances of the case, the maxim of equity, namely, actus curiae neminem gravabit– an act of the Court shall prejudice no man, shall be applicable. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law.'*

However, respondent No. 2 will not be entitled to claim any further benefits on his emoluments other than he has already gained by virtue of the interim order granted in his favour.

The respondent No. 2 has not challenged the findings of the Tribunal that the appointment of the respondent No. 2 was temporary. The finding of the Tribunal, therefore, having been confirmed, we find no merit in the arguments of the respondent No. 2 that his appointment was confirmed on permanent basis at any of time.

In view of the aforesaid facts and circumstances, the amount which has been paid to the respondent No. 2 by way of interim order will not be recoverable from the respondent No. 2. The writ petition, therefore, partly succeeds and is partly allowed.

(Rajesh Tandon, J.) **(P.C. Verma, A.C.J.)**

Dt.01.04.2004.

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